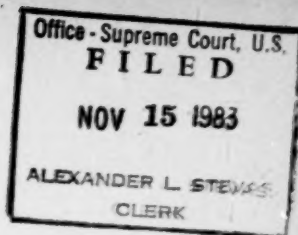


88-823



No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

CLACKAMAS COUNTY HOUSING
AUTHORITY, RALPH GROENER,
ROBERT SCHUMACHER, JONO D.
HILDNER,

Petitioners,

v.

WALLACE M. TELFORD,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KEITH JOHN KINSMAN
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Counsel for Petitioners

QUESTION PRESENTED FOR REVIEW

Where an Oregon local governmental agency which acts only in a governmental capacity in performing its statutory functions is prohibited from adopting a contract for governmental functions beyond its own term of office, may its governing body disregard a contract of employment entered into by a previous governing body for the employment of a chief executive officer whose duties are solely to further the statutory functions of the agency?

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OPINIONS BELOW

The opinion of the Court of Appeals, Telford v. Clackamas County Housing Authority, 710 F.2d 567 (9th Cir. 1983), appears in the Appendix hereto. The unreported Order of the District Court appears in the Appendix hereto.

JURISDICTIONAL STATEMENT

The opinion of the Court of Appeals for the Ninth Circuit was entered on July 14, 1983. An order denying rehearing was entered August 17, 1983. This petition was filed within 90 days of that date. 28 U.S.C. § 1254(1) confers jurisdiction on this court to review the judgment in question by Writ of Certiorari.

STATUTORY PROVISIONS

The full text of the provisions of Or. Rev. Stat. § 456.070, 456.105(4), 456.120, and 456.125 appears in the Appendix hereto.

STATEMENT OF THE CASE

On July 1, 1953, Respondent Telford ("Respondent") was hired without a written employment contract as Executive Director and Secretary-Treasurer of the

Clackamas County Housing Authority, whose statutory function is to respond to the declaration of the Oregon State Legislature:

That the clearance, replanning and reconstruction of the areas in which insanitary or unsafe housing conditions exist and the providing of safe and sanitary dwelling accommodations for persons and families of lower income are public uses and purposes for which public money may be spent and private property acquired and are governmental functions of state concern.

Or. Rev. Stat. § 456.070(5).

The board of commissioners of the Housing Authority was an independent body appointed by the Board of County Commissioners for Clackamas County pursuant to Or. Rev. Stat. § 456.095. The maximum term of a housing authority director is five years, pursuant to Or. Rev. Stat. § 456.100. After the 1976 political campaign for Clackamas County Commissioner, the Housing Authority entered into a written agreement to employ Respondent in the same capacity until the last day of February, 1982, a period of five years and two months. Pretrial Order, Clerk's Record "((", pp. 3-5.

On July 1, 1977, the Board of County Commissioners for Clackamas County exercised the power granted by Or. Rev. Stat. § 456.095 and assumed for themselves the powers of the governing body of the Clackamas County Housing Authority. The authority of the previous commissioners to act on behalf of the Housing Authority was terminated. Clerk's Record "(", p. 4.

The new Board of Commissioners found that their theories of low-income housing and the operation of the Housing Authority differed substantially from Respondent's. As a result, Respondent was replaced July 28, 1977, as executive director. He was housing manager until December 15, 1978, when he was retired pursuant to the Oregon Public Employees' Retirement Act, Or. Rev. Stat. § 237.001 to 237.315.

Respondent filed an action claiming deprivation of civil rights under 42 U.S.C. § 1983 and breach of contract in July, 1980. Jurisdiction for the civil rights claim was based on 28 U.S.C. § 1343, and the breach of contract claim was within the court's pendent jurisdiction. Petitioners moved for summary judgment and the United States magistrate,

before whom the parties had agreed to try all matters, granted the motion and awarded judgment for Petitioners on the ground that a public body may not contract for governmental functions for a period exceeding the governing body's term of office. On April 15, 1981, Respondent's action was therefore dismissed.

Respondent appealed the District Court's action, and on July 14, 1983, the Ninth Circuit Court of Appeals issued its opinion reversing the case and remanding it to the District Court. The Ninth Circuit held that Respondent's employment contract called for the exercise of proprietary or corporate functions, and that the only limitation for a public agency to adopt such a contract is a rule of reasonableness and good faith. On August 17, 1983, the Ninth Circuit Court of Appeals denied Petitioners' Petition for Rehearing.

REASONS FOR GRANTING THE WRIT

The decision of the Ninth Circuit Court of Appeals conflicts with the decisions of other Courts of Appeals as to the governmental or proprietary nature of functions of a government agency.

The efficient administration of policies to meet governmental goals is vital to the conduct of local government. With declining revenues and increasing demands for governmental services, local government agencies depend increasingly on the performance of their chief executive officer.

In this matter the Ninth Circuit erroneously held that an executive director of a housing authority, which could act only in a governmental capacity in performing its statutory functions, performed proprietary rather than governmental functions. The impact of this decision is that a local governing body is compelled to continue to employ a chief executive officer whether or not that officer's administrative policies and abilities reflect the theories of the governing body.

The chief executive officer position is a key link between a board of directors and the employees who provide the public services for which the government is organized. In formulating and implementing administrative policy, the chief executive officer reflects the will of the governing body, which in turn reflects the will of the source of governmental power -- the people. It is a close and confidential relationship imbued with the trust that the decisions of the board will be efficiently implemented.

Inherent in the relationship is the distinction between governmental functions -- those which are undertaken primarily for the benefit of the public -- and proprietary functions, which are directed toward the organization and conduct of the business of the agency. While nearly every governmental chief executive officer exercises both governmental and proprietary functions, the essence of the position is the delivery of public services to recipients of those services.

Many circuit courts of appeals have considered the distinction between the governmental and proprietary functions of a public body. The decision of the Ninth

Circuit in this matter, however, is in conflict with other circuit courts of appeals in determining whether a public body such as a housing authority exercises primarily governmental or proprietary powers.

In Clain v. City of Burlington, 202 F.2d 532 (2nd Cir. 1953), an automobile in which plaintiff was a passenger collided with a "silent policeman," a device placed in an intersection by the city to direct the flow of traffic. When the plaintiff brought an action against the city for negligence, the city defended on the ground that it was performing a governmental function in placing the silent policeman in the roadway. In an opinion written by Judge Learned Hand, the Second Circuit affirmed the trial court's dismissal of the action notwithstanding a jury verdict for the plaintiff. The court emphasized that the purpose of making the streets safer and more convenient for travel outweighed any other function the city may have been performing in the placement and maintenance of the device.

The Fifth Circuit considered the question in Imperial Production Corp. v.

City of Sweetwater, 210 F.2d 917 (5th Cir. 1954). Here the city operated an airport and incidentally rented space to the plaintiff for the storage of airplanes. When fire damaged the stored airplanes, the plaintiff sued the city for negligence in the operation of the airport. The circuit court affirmed the dismissal of the action, holding that the city was performing a governmental function for which it was immune from liability in negligence. Although the city had charged fees for the storage of airplanes, the court held that this activity did not destroy the governmental character of the municipal activity, which was not primarily undertaken for profit.

Similarly, in Hitchings v. Albemarle Hospital, 220 F.2d 716 (4th Cir. 1955), the plaintiff brought an action for personal injuries for the alleged negligence of the defendant in the construction, maintenance and lighting of a stairway at a hospital. The defendant claimed immunity from liability in its hospital operations because it was performing governmental functions. The Fourth Circuit affirmed the trial court's summary judgment for the defendant, holding that operation of

a hospital was a governmental function, discharging a duty imposed solely for the benefit of the public.

In this matter, Respondent was hired to manage the Clackamas County Housing Authority, a governmental body established by Oregon statute, Or. Rev. Stat. § 456.075, and designed to qualify for federal assistance through the U. S. Department of Housing and Urban Development pursuant to the United States Housing Act, 42 U.S.C. §§ 1401-1436. In declaring that Oregon housing authorities exist to eliminate insanitary or unsafe housing conditions and to provide safe and sanitary housing accommodations for lower income families, the Oregon State Legislature has provided that:

[a]n authority shall constitute a public body corporate and politic, exercising public and essential governmental functions, and having all the powers necessary or convenient to carry out and effectuate the purposes of the Housing Authorities Law.

Or. Rev. Stat. § 456.120
(emphasis added)

The Oregon Supreme Court has held that "in the performance of its statutory functions, the . . . Housing Authority acts only in a governmental capacity."

Wickman v. Housing Authority, 196 Or. 100, 117, 247 P.2d 630 (1952). The Ninth Circuit erroneously construed Wickman to hold that an Oregon housing authority exercises both governmental and proprietary functions, and erroneously relied on the case of Housing Authority of the City of Seattle v. State of Washington, 629 F.2d 1307 (9th Cir. 1980), a case which did not address the governmental-proprietary distinction. An Oregon housing authority's operations are no less governmental than the operation of an airport construed in the Imperial Production Corp. case, supra, or a hospital in the Hitchings case, supra.

An Oregon public body may not contract for governmental functions for a term longer than the government body's term of office.

If the work provided for in plaintiff's alleged contract is for a governmental function, then the great weight of authority is to the effect that the outgoing council could not bind its successors in such a contract.

Miles v. City of Baker, 152 Or. 87, 92-93, 51 P.2d 1047 (1935). The Ninth Circuit recognized this rule in its opinion.

Respondent's employment contract required him to perform statutory functions of the housing authority which are declared by Or. Rev. Stat. § 456.120 to be "public and essential governmental functions." Does this contract call for the exercise of governmental functions? The Oregon Attorney General has offered his opinion that the Executive Director of an Oregon Housing Authority performs governmental functions, so that a contract to employ him may not be extended beyond the term of the board that employed him. 56-58 Op. Atty. Gen. 174. Any other conclusion results in the incongruous position that no government employee exercises primarily governmental functions. A decision that he performs primarily proprietary functions burdens the governing body with a chief executive officer whose policies of operation of a housing authority conflict with the governing body's.

The trial court correctly ruled that the functions of an Oregon Housing Authority are governmental and that Respondent was employed to further those functions. Respondent's employment contract, which purported to bind a

governing body beyond its own term of office, is void.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

/s/ Keith John Kinsman
KEITH JOHN KINSMAN
Counsel for Petitioners

Dated: November 15, 1983

APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WALLACE M. TELFORD,	) FILED
	) July 14,
Plaintiff-Appellant,	) 1983
	) Phillip B.
v.	) Winberry
	) Clerk, U.S.
CLACKAMAS COUNTY HOUSING	) Court of
AUTHORITY, RALPH GROENER,	) Appeals
ROBERT SCHUMACHER, JONO D.)
HILDNER,	) No. 81-3251
	) D.C. #CV 80-
	) 680 JU
<u>Defendants-Appellees.</u>	) OPINION

Appeal from the United States District Court
for the District of Oregon

George E. Juba, Magistrate, Presiding

Argued and submitted June 11, 1982

Before: CHOY, TANG and BOOCHEVER, Circuit
Judges.

TANG, Circuit Judge.

This case concerns the validity of an employment contract between Mr. Telford and the former Board of Housing Commissioners for the Clackamas County Housing Authority, and the resulting property interest enjoyed by Mr. Telford. The validity of the contract depends upon whether, under Oregon law, Teleford [sic] was to perform proprietary or governmental functions. The magistrate held that the contract called for governmental functions, and could not

extend beyond the Housing Commissioners' terms of office.

Reviewing the magistrate's decision de novo, we find that Telford performed proprietary rather than governmental functions. Thus, the length of his contract was limited only by reasonableness and good faith rather than by the Housing Commissioners' own terms of office. We reverse.

I
Facts

Wallace Telford was the Executive Director and Secretary-Treasurer of the Clackamas County Housing Authority from July 1, 1953 to July 28, 1977. He was highly qualified and operated one of the two housing authorities in the nation that required no operating subsidy from HUD (Pretrial Order, Stipulated Facts).

On December 9, 1976, the Housing Authority contracted to employ Telford in that same capacity until the last working day of February 1982. The contract period was five years and two months. The termination date was Telford's seventieth birthday and planned retirement date. The parties entered into the contract because they "agreed that it would be in their mutual best interest to enter into a binding contract for the continued employment

of Telford until his retirement date of February, 1982 in order to provide Telford with job security to retirement and to ensure for the Housing Authority the continued services of its experienced and capable executive secretary." The parties had not entered a written contract before this time. Instead, Telford had been rehired informally on a regular basis since 1953.

Until July 1, 1977, the Housing Authority's governing body consisted of a five-member Board of Housing Commissioners. Individual board members had five-year terms of office. The terms were staggered, with one new member beginning each year. Effective July 1, 1977, the Clackamas County Board of Commissioners passed a resolution withdrawing all authority from the Housing Authority Board of Commissioners and transferring the functions and power of the Housing Board to themselves (Resolution and Order No. 77-668). Or. Rev. Stat. §§ 456.095, 456.233.

On July 28, 1977, the Housing Authority, through its new Board, demoted Telford from Executive Director to Housing Manager. On March 23, 1978, they lowered his salary from \$2,202 per month to \$1,725 per month (Resolution and Order No. 864).

Telford was fired as Housing Manager on December 15, 1978. He learned of his termination through a letter from the new Executive Director of the Housing Authority. The letter stated that Telford's "continued service is not in either the interest of the Housing Authority or the public"

In July of 1980, Telford filed an action under 42 U.S.C. § 1983 alleging that termination of his public employment deprived him of a property right without affording him due process as required by the fifth and fourteenth amendments to the United States Constitution. He also alleged breach of contract as a pendent Oregon state law claim.

The Housing Authority moved for summary judgment, and the United States Magistrate granted the motion.^{1/} The magistrate concluded that Telford had no property right under Oregon law, because under Oregon law a public body may not contract with a party to provide governmental functions for a term longer than the public body's term of office. He found that Telford performed governmental functions as Executive Director of the Housing Authority. Consequently, the magistrate held that Telford's contract exceeded, by

two months, the previous Housing Board's authority to contract, was void ab initio and, thus, did not confer a property right.

II

Standard of Review

Summary judgment is appropriate only when no genuine issue of material fact exists and the moving party is clearly entitled to prevail as a matter of law. Fed. R. Civ. P. 56(c); Bank of California, N.A. v. Opie, 663 F.2d 977, 979 (9th Cir. 1981); State ex rel. Edwards v. Heimann, 633 F.2d 886, 888 (9th Cir. 1980).

The existence of property rights and interests in continued employment entitled to protection under the Due Process Clause is determined by reference to state law. Board of Regents v. Roth, 408 U.S. 564, 577 (1972); Black v. Payne, 591 F.2d 83, 88 (9th Cir.), cert. denied, 444 U.S. 985 (1979). The existence of a property interest in this case depends on the validity of Telford's employment contract under Oregon law. The contract is valid under Oregon law if it created duties of a proprietary rather than of a governmental nature. Miles v. City of Baker, 152 Or. 87, 92-93, 51 P.2d 1047 (1935); Jacobberger v. School District No. 1, 122 Or. 124, 131, 256 P. 652 (1927).

In deciding whether proprietary or governmental duties were the subject of contract we must first determine the distinction between these functions under Oregon law and then construe the terms of the contract in light of those distinctions. We have traditionally accorded deference to a district court's interpretation of the substantive law of the state in which the court sits. See State ex. rel. Edwards v. Heimann, 633 F.2d at 888 n. 1 (9th Cir. 1980). However, pursuant to a stipulation by the parties, this case was decided by a magistrate. Because magistrates are not judges under Article III of the Constitution and because the magistrate's decision did not receive the imprimatur of a district court judge, we conclude that the decision is entitled to little or not [sic] special deference. Therefore, this court may determine independently the distinctions between proprietary and governmental functions under Oregon law. As to the interpretation of contractual language, we grant de novo review. Bank of California, N.A. v. Opie, 663 F.2d at 979.

III

Validity of the Contract

An employee's interest in continued employment is a "property" interest for due

process purposes if there are rules or mutually explicit understandings that support a claim of entitlement to the benefit. Perry v. Sindermann, 408 U.S. 593, 601 (1972); Board of Regents v. Roth, 408 U.S. at 577; Guy v. Mohave County, 688 F.2d 1287, 1289 (9th Cir. 1982); Minielly v. Oregon, 242 Or. 490, 411 P.2d 69, 73 (1966); Papadopoulos v. Oregon State Board of Higher Education, 14 Or. App. 130, 511 P. 2d 854 (1973), cert. denied, 417 U.S. 919 (1975). A written contract with an explicit provision for the length of employment is evidence of a formal understanding supporting a claim of entitlement to employment, unless sufficient cause for removal is shown. Perry v. Sindermann, 408 U.S. at 601. However, absence of an explicit contractual provision does not always preclude the possibility of a property interest in continued employment or re-employment. Id. A property interest in employment can also be created by ordinance or by an implied (rather than an express) contract. Bishop v. Wood, 426 U.S. 341, 344 (1976); Perry v. Sindermann, 408 U.S. at 601; Black v. Payne, 591 F.2d at 88. In any event, the sufficiency of the entitlement claim must be decided by reference to state law. Board of Regents

v. Roth, 408 U.S. at 577; Black v. Payne, 591 F.2d at 88. Thus, the claim of entitlement here is dependent upon the validity of Telford's employment contract under Oregon law.

In cases concerning a public body's power to enter contracts outlasting its own term of office, the Oregon Supreme Court has distinguished between public employees performing "governmental functions" and those employees performing "proprietary functions." Jacobberger v. School District No. 1, 122 Or. at 131. An Oregon public body may not enter a contract for governmental functions extending beyond its own term of office. The power to contract with one to perform proprietary functions, however, is limited only by "reasonableness and good faith." Id. at 131, 135. Thus, if Telford was to have performed governmental functions, the contract period could not extend beyond the term of the Board of Housing Commissioners.

If the work provided for in plaintiff's alleged contract is a governmental function, then the great weight of authority is to the effect that the outgoing council could not bind its successors in such a contract.

Miles v. City of Baker, 152 Or. at 92-93.

The County Housing Authority itself, as a municipal corporation, is both a corporate and politic public body. It performs both governmental and proprietary functions. Or. Rev. Stat. § 456.120; Wickman v. Housing Authority of Portland, 196 Or. 100, 117, 247 P.2d 630 (1952). See also Housing Authority of the City of Seattle v. State of Washington, 629 F.2d 1307, 1309 (9th Cir. 1980); 10 McQuillin, Municipal Corporations § 29.100 (3d ed. 1981). Thus, the Housing Authority's Board of Housing Commissioners, in whom all of the powers and duties of the Housing Authority are vested, also performs both governmental and proprietary functions. Or. Rev. Stat. § 456.095.

Telford's powers and duties, however, were determined solely by the Housing Commissioners and created by contract. Or. Rev. Stat. § 456.105(4). The issue, then, is whether Telford's contractual duties constituted governmental or proprietary functions.

Oregon substantive law provides little guidance. In Jacobberger v. School District No. 1, supra, the Oregon Supreme Court held that the contract between an architect and a school board could extend beyond the school board's term of office.

In Miles v. City of Baker, 152 Or. 87, 51 P.2d 1047 (1935), the Oregon Supreme Court held the outgoing City Board of Commissioners could not enter a binding contract with an accountant to audit the city's books for the following fiscal year. It found that the accountant had been hired to perform a governmental function. Neither case, however, analyzed the employment functions to be carried out in terms of objective criteria for making the governmental-proprietary function distinction. Moreover, the results in Miles and Jacobberger are not easily reconciled. No more recent Oregon case discusses the governmental-proprietary function distinction in the context of municipal contract law.^{2/}

The magistrate below concluded that Telford "was hired to perform governmental functions because his [contractual] responsibilities were intended to further the statutory functions of the Housing Authority and help provide safe and sanitary dwelling accommodations for persons and families of lower income." This reasoning is unpersuasive. The responsibilities and duties of every Housing Authority employee are intended to further the statutory functions and goals of the

Housing Authority. The magistrate, thus, suggests that every Housing Authority employee, no matter how menial his tasks, necessarily performs governmental functions because, to some degree, he aids the Housing Authority in its statutory functions. Such reasoning would result in every public employee, who aids his employer, being terminable at will, despite any contractual relationship or guarantee. The magistrate also concluded that, because helping to provide housing for lower income persons benefits the public, it constitutes a governmental function. We do not find compelling the suggestion that every contract which in some way, however minor, benefits the public good is a contract for governmental functions. See Corvallis Sand & Gravel Co. v. State Land Board, 250 Or. 319, 439 P.2d 575, 581-84, 585 (1968) (O'Connell, J., dissenting); Wold v. City of Portland, 166 Or. 455, 463, 112 P.2d 469 (1941). All public employees work for the public good and public benefit. Not all public employees perform governmental functions, however.

A part of Mr. Telford's contract called for broad duties in general terms. He was to be the public representative of the Housing Authority and was to enforce

adopted management policies. Telford had no authority to make policy, however. He only carried out policies set by Housing Commissioners. Telford's specific contractual duties were identical to those that would be provided by a private corporation or a private landlord. He operated the Housing Authority for a profit, he paid bills, collected rents, maintained records, reviewed tenant applications, interviewed and selected tenants. See Prosser, Torts § 131 at 980-81 (4th ed. 1971); 10 McQuillin, Municipal Corporations § 29.101 at 468-69 (3d ed. 1981). These are proprietary or corporate functions. Telford's contractual duties did not fall within the class of governmental functions in any substantial part.

Absent a recent, express statement of substantive law by the Oregon Supreme Court, we are unable to conclude that Telford's contract was for governmental functions in any substantial part.^{3/} Consequently, under Oregon law, the contract was not void because it extended into the term of a new Housing Commission. The power of the Housing Authority Commissioners to contract for such functions was limited only by "reasonableness and good faith."

Jacobberger v. School District No. 1, 122 Or. at 131, 135, 256 P. 652 (1927).^{4/}

The contract was entered into in good faith by the parties. All agreed that it would serve their mutual best interest to enter a binding contract to provide Telford with job security until retirement and to provide the Housing Authority with the "continued services of its experienced and capable executive secretary." It also was reasonable both in its terms and duration, in light of Mr. Telford's impressive twenty-five year employment history with the county.

Moreover, the Oregon Supreme Court, like many others, has gone beyond considering only the facial validity of contracts. The court has balanced the reasons for enforcing arguably invalid contracts against the traditional reasons for invalidating them. Deering v. Hyde, 278 Or. 215, 219, 563 P.2d 693 (1977). See also Hendrix v. McKee, 281 Or. 123, 128-29, 575 P.2d 134 (1978); Harrell v. Travelers Indemnity Co., 279 Or. 199, 206, 567 P.2d 1013 (1977); Eldridge v. Johnston, 195 Or. 379, 405, 245 P.2d 239 (1952).

None of the parties to Telford's contract suspected that it might be invalid. See Hendrix v. McKee, 281 Or. at 128-29.

Telford had been employed continuously since 1953. All parties abided by the contract, until the new board was installed. The contract did not call for illegal or immoral services. It violated no statutes. It did not tend to injure the public in any way. No important public interest needing protection is affected by the contract or outweighs the many reasons to enforce the contract. See Deering v. Hyde, 278 Or. at 219.

Telford's contract with the Housing Authority was valid. Telford had an expectation of continued employment giving rise to a property interest protected by the Due Process Clause of the United States Constitution. That contract was breached by the Housing Authority.

The Housing Authority, therefore, was not entitled to summary judgment. The case is reversed and remanded for further proceedings in accordance with this opinion.

REVERSED and REMANDED.

FOOTNOTES

1/ The parties agreed to try all matters before a magistrate. See 28 U.S.C. § 636(c).

2/ At least until 1970, however, the Oregon Supreme Court continued to recognize the governmental-proprietary function distinction in the area of sovereign immunity from tort liability. See e.g., Elmore v. Aloha Sanitary Service, 256 Or. 267, 473 P.2d 130, 131-32 (1970) (treatment and disposal of sewage constitutes a governmental function for purposes of governmental immunity). The distinction has been diluted by Or. Rev. Stat. 30.265(1) which provides that, subject to certain limitations, "every public body is liable for its torts and those of its officers, employees and agents acting within the scope of their employment or duties, whether arising out of a governmental or proprietary function. . . ." The emphasis now is upon whether the tortfeasor was performing a discretionary function. Or. Rev. Stat. 30.265(3)(c).

3/ We cannot interpret an opinion of the Oregon Attorney General, relying on out-of-state law, as authority comparable to a definitive statement of Oregon law by the Oregon Supreme Court. See 1956-58 Op. Atty. Gen. 174 (1957).

4/ We need not discuss whether Oregon common law gave the Housing Authority the "power to remove" Telford at the city's [sic] pleasure and without cause from public office or whether that power could be contracted away. See Morris v. Parks, 145 Or. 481, 485, 28 P.2d 215 (1934). Telford was not a public officer. Moreover, the 1934 language cited by the parties, that

the implied power of removal cannot be contracted away, is of doubtful validity after Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 593 (1972); Bishop v. Wood, 426 U.S. 341 (1976); Minielly v. Oregon, 242 Or. 490, 411 P.2d 69 (1966); and Papadopoulos v. Oregon State Bd. of Higher Educ., 14 Or. App. 130, 511 P.2d 854 (1973), cert. denied, 417 U.S. 919 (1975).

Entered on the
Docket on 4-10-81
ROBERT M. CHRIST

IN THE UNITED STATES' DISTRICT COURT
FOR THE DISTRICT OF OREGON

WALLACE M. TELFORD)	
)	
Plaintiff,)	
)	
v.	)	Civil No.
	)	80-680-JU
CLACKAMAS COUNTY HOUSING)	
AUTHORITY, RALPH GROENER,	)	ORDER
ROBERT SCHUMACHER, JONO D.))	
HILDNER,)	
)	
Defendants.)	

This action was brought pursuant to 42 U.S.C. § 1983 for deprivation of an alleged property right to a job without due process of law. A pendent claim for breach of an employment contract is also alleged.¹ The case is before this court on defendants' motion for summary judgment. This motion raises the question of whether under Oregon law the board of commissioners of a housing authority may validly contract with its executive director for a term of employment longer than the term of office of the board.

¹ Jurisdiction of the § 1983 claim is under 28 U.S.C. § 1343; jurisdiction of the contract claim is within the court's pendent jurisdiction.

The parties consented to try all matters before me.

Plaintiff, Wallace M. Telford, was the Executive Director of defendant Clackamas County Housing Authority (Housing Authority) from July 1, 1953 until July 28, 1977. He is a highly qualified executive director. On December 9, 1976, Telford and the Board of Commissioners of the Housing Authority (old board) entered into an employment agreement which purported to reappoint Telford as Executive Director of the Housing Authority for a term of five years and two months extending until Telford's seventieth birthday in February 1982. Defendants argue that this contract was ultra vires because it purports to grant Telford a term of office which is longer than the term of office of the board. The individual board members each had a five-year term of office.

In April 1977, the Board of Commissioners of Clackamas County (the county commission) passed a resolution which was effective July 1, 1977. That resolution withdrew all authority from the old board. It also named the county commission as the new governing body (new board) of the Housing Authority.

On July 28, 1977, Telford was replaced as Executive Director by defendant Hildner. Telford was retained by the Housing Authority in a position known as "housing manager." On March 23, 1978, Telford's salary was reduced. On December 4, 1978, defendant Hildner informed Telford that effective December 15, 1978, he was being retired.

Telford subsequently brought this action. He alleges that he had a property right in the position of Executive Director by virtue of the employment agreement he signed in December 1976 with the old board. He alleges that he was deprived of this property right without due process of law. State law determines whether Telford had a property right. Board of Regents v. Roth, 408 U.S. 593 (1972). Thus, this case hinges on whether Oregon law recognizes the validity of the employment agreement.

VALIDITY OF THE EMPLOYMENT AGREEMENT

Defendants argue that the employment agreement is invalid because under Oregon law a public body may not contract for governmental functions for a term longer than the government body's term of office.

If the work provided for in plaintiff's alleged contract is a governmental function, then the great weight of authority is to the effect that the outgoing council could not bind its successors in such a contract.

Miles v. City of Baker, 152 Or. 87, 92-93, 51 P.2d 1047 (1935). The Oregon Supreme Court has stated:

The authorities are agreed, however, that when the undertaking by the city is not for the promotion of its private interests as a corporate entity, but for the public good, such undertaking is governmental.

Wold v. City of Portland, 166 Or. 455, 463, 112 F.2d 469 (1941). Although the court drew this distinction in the context of sovereign immunity to tort action, the distinction is equally applicable here. The Oregon Supreme Court has said that "in the performance of its statutory functions, the . . . Housing Authority acts only in a governmental capacity." Wickman, et al. v. Housing Authority, 196 Or. 100, 117, 247 P.2d 630 (1952). Telford's employment agreement enumerated the following responsibilities:

1. Official representative of the Housing Authority in all public relationships and appearances. Handle all contacts of

the Housing Authority with local city and federal government officials. Enforce adopted management policies and manage the Housing Authority's housing projects.

2. Pay all bills, maintain accounting records and prepare all financial and operating reports.

3. Process tenant applications, investigate eligibility, and make selections for vacancies and process tenant interims and re-examinations.

4. Supervise all Authority employees and tenant programs.

(Employment Agreement, PTO exhibit A at 2-3). I conclude that Telford was hired to perform governmental functions because his responsibilities were intended to further the statutory function of the Housing Authority which is:

providing of safe and sanitary dwelling accomodations [sic] for persons and families of lower income.

ORS 456.070(5). Consequently, under the holding in Miles v. City of Baker, supra, the old board could not contract with Telford for an employment term longer than its own term of office.

Telford attempts to distinguish Miles v. City of Baker on the ground that there

was a charter provision which provided that the plaintiff auditor was "subject to removal by the board at any time at its pleasure and without cause." Miles v. City of Baker, supra at 91. No such clause is involved in this case.

However, the common law of Oregon provides for the removal of public officers in much the same way as the quoted clause in Miles v. City of Baker.

The power of appointment generally carries with it as an incident the power of removal.

Morris v. Parks, 145 Or. 481, 485, 28 P.2d 215 (1934). Telford contends that he does not come within the holding of Morris v. Parks because it involved a law enforcement officer which he clearly was not. However, the definition of a public officer in Morris v. Parks encompasses much more than law enforcement officers.

[A]s a general rule . . . a position is a public office when it is created by law, with duties cast on the incumbent which involve an exercise of some portion of the sovereign power and in the performance of which the public is concerned, and which also are continuing in their nature and not occasional or intermittent; while a public employment, on the other hand, is a position which lacks

one or more of the foregoing elements.

Id. at 483. Based on this definition, Telford was a public officer. His position is created in ORS 456.105. It involves the health and welfare of the public which is a sovereign function. The public is certainly concerned with this function. Telford was employed on a continuous and full-time basis.

Thus, this case is indistinguishable from Miles v. City of Baker because in both cases the governing body had the power of removal. In Miles the city council had it by ordinance, whereas here the Housing Authority had it by operation of law.

Telford's last argument in favor of the employment agreement is that the Oregon legislature has impliedly authorized the boards of housing authorities to contract with their executive directors for periods which extend beyond the term of the board. Telford relies on ORS 456.105 and 456.120 in support of this argument. ORS 456.105 provides in pertinent part:

(4) An authority may employ a secretary (who shall be executive director) . . . as it requires. It shall determine . . . qualifications, duties and compensation.

ORS 456.120 provides in pertinent part:

An authority shall constitute a public body . . . having all the powers necessary or convenient to carry out and effectuate the purposes of the Housing Authorities Law. These powers . . . include . . . : (4) To make and execute contracts and other instruments necessary or convenient to the exercise of the powers of the authority.

. . .

(6) To arrange or contract for the furnishing by any person . . . of services, privileges, works or facilities for, or in connection with, a housing project or the occupants thereof.

Telford argues that where a statute has conferred broad contractual powers on the governing body, these powers include the power to contract for employment beyond the term of the governing body. He cites Jacobberger v. School District No. 1, 122 Or. 124, 256 P.2d 652 (1927) in support of this position. The plaintiff in Jacobberger was an architect who had been hired to design and supervise the building of a school. The court upheld the validity of the contract in that case even though it extended beyond the term of the school board which hired the plaintiff. However, Jacobberger is distinguishable

from both this case and Miles v. City of Baker because the plaintiff was not hired to perform a governmental function. In this case, Telford was hired to perform a governmental function. The old board had no power to bind the new board to keep Telford as Executive Director. Neither the statute nor common law provides for that authority.²

Telford argues that even if the employment agreement was ultra vires, it was merely a voidable contract rather than one void ab initio. He contends that the new board ratified the employment agreement by keeping him on as Executive Director for four weeks after it took office. Telford is simply wrong about the nature of the employment agreement. According to Oregon law, a contract which is contrary to law or public policy is void. Hendrix v. McKee, 281 Or. 123, 128, 575 P.2d 134 (1978); Morris v. Parks, supra at 486. The employment agreement

²I note that it would be bad policy to allow an outgoing board to bind its successors to an executive officer who reflected the policies of the old board rather than the new.

was void from the beginning. No amount of ratification would make it valid.

CONCLUSION

Plaintiff Telford had no property right under Oregon law in his job as Executive Director of defendant Housing Authority. The employment agreement which purported to give him that property right was void because the old board of the Housing Authority acted ultra vires in entering an employment agreement with Telford which purported to extend beyond the old board's term of office. Summary judgment is granted in favor of defendants.

The action is dismissed.

Dated this 10th day of April, 1981.

/s/ George E. Juba
United States Magistrate

FILED
Aug. 17, 1983
Phillip B. Winberry
Clerk, U.S. Court
of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WALLACE M. TELFORD,)
) No. 81-3251
Plaintiff-Appellant,)
) ORDER
v.)
)
CLACKAMAS COUNTY HOUSING)
AUTHORITY, RALPH GROENER,)
ROBERT SCHUMACHER, JONO D.)
HILDNER,)
)
Defendants-Appellees.)

Before: CHOY, TANG and BOOCHEVER, Circuit
Judges

The court has considered the Petition
for Rehearing. The Petition for Rehearing
is denied.

Or. Rev. Stat. § 456.070

It is hereby declared:

(1) That there exist in the state insanitary or unsafe dwelling accommodations and that persons and families of lower income are forced to reside in such insanitary or unsafe accommodations.

(2) That within the state there is a shortage of safe or sanitary dwelling accommodations available at rents which persons and families of lower income can afford and that such persons and families are forced to occupy overcrowded and congested dwelling accommodations.

(3) That the conditions stated in subsections (1) and (2) of this section cause an increase in and spread of disease and crime and constitute a menace to the health, safety, morals and welfare of the residents of the state and impair economic values and that these conditions necessitate excessive and disproportionate expenditures of public funds for crime prevention and punishment, public health and safety, fire and accident protection and other public services and facilities.

(4) That slum areas in the state cannot be cleared, nor can the shortage of safe and sanitary dwellings for persons

and families of lower income be relieved, through the operation of private enterprise, and that the construction of housing projects for persons and families of lower income would therefore not be competitive with private enterprise.

(5) That the clearance, replanning and reconstruction of the areas in which insanitary or unsafe housing conditions exist and the providing of safe and sanitary dwelling accommodations for persons and families of lower income are public uses and purposes for which public money may be spent and private property acquired and are governmental functions of state concern.

(6) That it is in the public interest that work on projects for such purposes be commenced as soon as possible in order to relieve unemployment which now constitutes an emergency.

(7) As a matter of legislative determination, that there is a necessity in the public interest for the Housing Authorities Law.

Or. Rev. Stat. § 456.105(4)

An authority may employ a secretary (who shall be executive director), technical experts and such other officers, agents and employes, permanent and temporary, as it requires. It shall determine their qualifications, duties and compensation.

Or. Rev. Stat. § 456.120

An authority shall constitute a public body corporate and politic, exercising public and essential governmental functions, and having all the powers necessary or convenient to carry out and effectuate the purposes of the Housing Authorities Law. These powers shall be vested in the commissioners of the authority and shall include the following in addition to others granted in the Housing Authorities Law:

- (1) To sue and be sued.
- (2) To have a seal and to alter the same at pleasure.
- (3) To have perpetual succession.
- (4) To make and execute contracts and other instruments necessary or convenient to the exercise of the powers of the authority.
- (5) To make and from time to time amend and repeal bylaws, rules and regulations, not inconsistent with the Housing Authorities Law, to carry into effect the powers and purposes of the authority.
- (6) To arrange or contract for the furnishing by any person or agency, public or private, of services, privileges, works or facilities for, or in connection

with, a housing project or the occupants thereof.

(7) Notwithstanding any laws to the contrary, to include in any contract let in connection with a project, stipulations requiring that the contractor and any subcontractors comply with requirements as to minimum wages and maximum hours of labor, and comply with any conditions which the Federal Government attaches to its financial aid of the project.

(8) To lease or rent any dwellings, houses, accommodations, lands, buildings, structures or facilities embraced in any housing project and, subject to the limitations of the Housing Authorities Law, to establish and revise the rents or charges therefor.

(9) To own, hold and improve real or personal property.

(10) To purchase, lease, obtain options upon, acquire by gift, grant, bequest, devise or otherwise any real or personal property or any interest therein.

(11) To sell, lease, exchange, transfer, assign, pledge or dispose of any real or personal property or any interest therein.

(12) To insure and provide for the insurance of any real or personal property or operations of the authority against any risks or hazards.

(13) To procure insurance or guarantees from the Federal Government of the payment of any debts or parts thereof, whether or not incurred by said authority, secured by mortgages on any property included in any of its housing projects.

(14) To invest any funds held in reserves or sinking funds, or any funds not required for immediate disbursement, in property or securities in which savings banks may legally invest funds subject to their control.

(15) To purchase its bonds at a price not more than the principal amount thereof and accrued interest, all bonds so purchased to be canceled.

(16) To exercise all or any part or combination of powers granted in the Housing Authorities Law.

Or. Rev. Stat. § 456.125

Within its area of operation, a housing authority may:

(1) Investigate into living, dwelling and housing conditions and into the means and methods of improving such conditions.

(2) Determine where slum areas exist or where there is a shortage of decent, safe and sanitary dwelling accommodations for persons or families of lower income.

(3) Make studies and recommendations relating to the problems of clearing, replanning and reconstructing of slum areas and the problem of providing dwelling accommodations for persons or families of lower income. An authority may cooperate with the city, county or state or any of their political subdivisions in action taken in connection with such problems.

(4) Engage in research, studies and experimentation on the subject of housing.

(5) Prepare, carry out, acquire, lease and operate housing projects.

(6) Provide for the construction, reconstruction, improvement, alteration or repair of any housing project or any part thereof.

EMPLOYMENT AGREEMENT

This agreement is made this 9th day of December, 1976 between THE HOUSING AUTHORITY OF THE COUNTY OF CLACKAMAS, OREGON, herein called Housing Authority, and WALLACE M. TELFORD, herein called Telford.

The circumstances of this agreement are that the Housing Authority is a public corporation created under Oregon Revised Statutes 456.075 to 456.090 in Clackamas County, Oregon. Telford has been the Executive Director, Secretary-Treasurer of the Housing Authority since July 1, 1953. Telford will reach the age of 70 years in the month of February, 1982. The parties have agreed that it would be in their mutual best interest to enter into a binding contract for the continued employment of Telford until his retirement date of February, 1982 in order to provide Telford with job security to retirement and to ensure for the Housing Authority the continued services of its experienced and capable executive secretary.

The parties have agreed as follows:

EMPLOYMENT:

The Housing Authority hereby employs Telford and Telford hereby accepts

employment upon the terms and conditions hereinafter set forth.

TERM:

The term of this agreement shall begin on the date hereof and shall terminate on the last working day of February, 1982.

COMPENSATION:

For all services rendered by Telford to the Housing Authority under this agreement, the Housing Authority shall pay to Telford for the 1976-77 fiscal year of the Housing Authority, an annual salary of \$24,480 payable in semi-monthly installments on the 15th day and 30th day of each month. For subsequent fiscal years during the term of this agreement, salary adjustments shall be made on the same basis as they have been made since 1966; that is, on the basis of the salary comparability study done for the Housing Authority by Carlson and Associates, Personnel Consultants, dated February 1, 1966.

FRINGE BENEFITS:

During the term of this agreement, Telford shall be entitled to the same fringe benefits and on the same terms as all other employees of the Housing

Authority as set forth in the Housing Authority's Personnel Policies.

EXTENT OF SERVICES:

Telford shall devote his entire time, attention and energies during the normal work week to the business of the Housing Authority and shall have the following responsibilities and duties:

1. Official representative of the Housing Authority in all public relationships and appearances. Handle all contacts of the Housing Authority with local city and federal government officials. Enforce adopted management policies and manage the Housing Authority's housing projects.
2. Pay all bills, maintain accounting records and prepare all financial and operating reports.
3. Process tenant applications, investigate eligibility, and make selections for vacancies and process tenant interims and re-examinations.
4. Supervise all Authority employees and tenant programs.

WORKING FACILITIES:

Telford shall be furnished with a private office, stenographic help and such other facilities and services suitable to

his position and adequate for the performance of his duties.

EXPENSES:

Telford is authorized to incur reasonable expenses for promoting the business of the Housing Authority, including expenses for travel and similar items. The Housing Authority will reimburse Telford for all such expenses upon presentation by Telford from time to time of an itemized account of such expenditures.

VACATIONS:

Telford shall be entitled each year to a vacation of such length as is provided for an employee of his tenure in the Housing Authority's Personnel Policies, during which time his compensation shall be paid in full.

TERMINATION WITHOUT CAUSE:

In the event that the Housing Authority should terminate this agreement without cause, the parties acknowledge that it is impossible at this time to ascertain what Telford's actual damages would be. The parties further agree that it is possible, even probable, that, due to the specialized nature of Telford's employment and the lack of similar employment opportunities in the area, coupled with Telford's age, that

Telford, upon a discharge without cause, would be unable to obtain other suitable employment at all and, in such event, it is reasonable to anticipate that Telford's damages for a wrongful discharge would equal the total compensation due and owing under this agreement. The parties therefore agree that, in the event of a discharge of Telford without cause during the term of this agreement, there shall be paid to him as his liquidated damages, an amount equal to the then remaining unpaid salary then due under this agreement with an assumed cost of living increase of five percent for each fiscal year, or part thereof, remaining under the term of this agreement subsequent to the discharge. In determining such damages, there shall be included the reasonable value, as determined by the cost to the Housing Authority, of all fringe benefits to which Telford was entitled at the time of discharge. For the purposes of this paragraph, "good cause" shall mean such misconduct connected with work as would disqualify an individual for the receipt of unemployment insurance benefits under the laws of the State of Oregon.

ASSIGNMENT:

The rights and obligations of the Housing Authority under this agreement shall inure to the benefit of, and shall be binding upon, the successors and assigns of the Housing Authority.

ENTIRE AGREEMENT:

This instrument contains the entire agreement of the parties. It may not be changed orally, but only by an agreement in writing signed by the party against whom the enforcement of any waiver, change, modification, extension, or discharge is sought.

IN WITNESS WHEREOF, the parties have executed this agreement the day and year first hereinabove written.

THE HOUSING AUTHORITY OF THE
COUNTY OF CLACKAMAS

By: /s/ J. Gordon Roberts
Chairman

By: /s/ Charles E. Hallquist
Vice-Chairman

/s/ Wallace M. Telford
Wallace M. Telford

FILED

DEC 19 1983

ALEXANDER L. STEVAS,
CLERK

No. 83-823

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

CLACKAMAS COUNTY HOUSING
AUTHORITY, RALPH GROENER,
ROBERT SCHUMACHER, JONO D.
HILDNER,

Petitioners,

v.

WALLACE M. TELFORD,

Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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ON A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, for the reasons set forth
herein, respectfully request this Honorable
Court deny the Petition for Writ of Cer-
tiorari to the United States Court of

Appeals for the Ninth Circuit.

REASONS FOR DENYING THE WRIT

Rule 17 of the United States Supreme Court Rules sets forth the considerations of this court governing review on certiorari. Respondent contends that none of these considerations are encountered in the Petition for a Writ of Certiorari herein.

The United States Court of Appeals for the Ninth Circuit did not render a decision in conflict with the decision of another federal court of appeals on the same matter. [United States Supreme Court Rule 17.1(a)].

Petitioners fail to state clearly the points requiring consideration when they fail to distinguish those rules which determine when a government agency acts in its governmental or proprietary capacity from Respondent's position as an employee

of a government agency. [United States Supreme Court Rule 21.5].

The United States Court Of Appeals
For The Ninth Circuit Did Not Render
A Decision In Conflict With Other
Courts Of Appeals As To The Govern-
mental Or Proprietary Nature Of
Functions Of A Government Agency

Respondent brought suit against the
petitioners alleging they had breached an
employment contract for a term of years.
Petitioners now frame the controlling
issue in terms of whether petitioner
Clackamas County Housing Authority was
acting in its governmental or proprietary
capacity when it entered into its contract
with Respondent.

Petitioners claim the opinion of the
Court of Appeals for the Ninth Circuit in
Telford v. Clackamas County Housing Author-
ity, 710 F 2d 567 (9th Cir. 1983), is in
conflict with the Second Circuit's opinion
in Clain v. City of Burlington, 202 F 2d
532 (2nd Cir. 1953), the Fifth Circuit's

opinion in Imperial Production Corp. v. City of Sweetwater, 210 F 2d 917 (5th Cir. 1954), and the Fourth Circuit's opinion in Hitchings v. Albemarle Hospital, 220 F 2d 716 (4th Cir. 1955). Unlike the case at bar, which concerns contract law, each of the three latter cases addressed the question of whether the public body was acting in its governmental or proprietary capacity in the context of a tort suit. If the government agency was acting in its governmental capacity, it would enjoy sovereign immunity from the negligent acts of its agents; however, if the agency was acting in its proprietary capacity, no immunity would lie.

In Clain, the court noted the history of the governmental/proprietary distinction and the doctrine's close relation to government's increasing involvement in the supply of nonessential services. The court wrote that:

* * * as time went on, villages and cities began more and more to dispense to their residents for pay services that individuals had theretofore supplied--so far as they had existed at all * * *; and the courts began to think it unreasonable to treat such activities as though they were the same as the older and more vital services of protection against violence and fire, maintenance of highways, and the like. Injuries done to an individual in performing such functions were so like the same services, performed by "public utility" corporations, that it seemed intolerable not to treat recoveries for the negligent exercise of the powers granted as a cost of the services rendered. Thus arose a distinction between "governmental," and "proprietary," activities," * * *. 202 F 2d at 533.

The court went on to find that making the streets safe for travel was an essential governmental function. Yet the court's analysis suggests they would find, as did the Ninth Circuit, that Respondent performed proprietary duties. In Telford, the court described Respondent's duties as follows:

A part of Mr. Telford's contract called for broad duties in general terms. He was to be the public representative of the Housing Authority and was to enforce adopted management policies. Telford had no authority to make policy, however. He only carried out policies set by Housing Commissioners. Telford's specific contractual duties were identical to those that would be provided by a private corporation or a private landlord. He operated the Housing Authority for a profit, he paid bills, collected rents, maintained records, reviewed tenant applications, interviewed and selected tenants. [citations omitted]. These are proprietary or corporate functions. Telford's contractual duties did not fall within the class of governmental functions in any substantial part. 710 F 2d at 571 [emphasis added].

Respondent's duties as a landlord do not rise to the level of "vital services" which compelled the Second Circuit, in Clain, to hold that maintenance of the public way in a safe condition was a governmental, rather than proprietary, function.

In Imperial Production Corp. v. City of Sweetwater, supra, the municipal body conceded that, in the absence of any state statute, the operation of an airport is a proprietary act of a municipality. 210 F 2d at 918. The circuit court felt constrained by the Municipal Airport Act of the State of Texas, Article 46d, Sec. 15, Revised Civil Statutes of Texas, Vernon's Ann.Civ. St., to find that the city's operation of the airport was a governmental function. The statute found controlling in Imperial Production Corp. provided that that "* * * operation, regulation, protection and policing of airports * * * are hereby declared to be public and governmental functions, exercised for a public purpose, and matters of public necessity * * *." Art. 46d-15, Vernon's Ann. Civ.St.

The enabling statutes for a local

housing authority in the State of Oregon are significantly more broad and unrestricted than the Texas statute at issue in Imperial Production Corp. Oregon Revised Statutes Sec. 456.120 provides that "[a]n authority shall constitute a public body corporate and politic, exercising public and essential governmental functions, and having all the powers necessary or convenient to carry out and effectuate the purposes" of the Act. [emphasis added].

While the Texas statute could easily be read as a legislative attempt to limit the risk assumed by a municipality in the operation of an airport, particularly in light of the inherent danger of operating aircraft, the Oregon statute expressly provides that a housing authority shall be vested with both corporate (meaning "proprietary") and politic (meaning "governmental") powers. This difference between the statutes is fundamental; the

Texas statute is so dissimilar that the Fifth Circuit opinion cannot be held as dispositive of the within cause. On the contrary, the Oregon legislative scheme, by its terms, contemplates that the petitioning Housing Authority will, as the need arises, exercise proprietary powers. Had the Oregon Legislature desired to cloak the Housing Authority in a veil of immunity, as Petitioners now assert, it would have done so by statute. The Ninth Circuit did not controvert any Oregon statute when it determined Respondent performed proprietary duties. The panel expressly found that Respondent's contract with the Housing Authority "violated no statutes." 710 F 2d at 572.

In Hitchings v. Albemarle Hospital, supra, the circuit court was faced with a negligence action against a hospital operated by a municipality. Although no cases on point were found, the court

followed a "distinct tendency" in the North Carolina decisions to grant immunity in such cases. They went on to note that it is the general rule in that jurisdiction to disallow liability unless allowed by statute. In the case at bar, the Housing Authority's enabling legislation clearly states that it may act in a proprietary capacity.

It is significant to note that in all three cases relied on by Petitioners, Clain, Imperial Production Corp., and Hitchings, the individual circuit courts felt obliged to follow state law on the substantive issue. The question of when an Oregon government body is acting in a governmental, rather than proprietary, fashion is one peculiar to the laws of Oregon. It does not present a federal question where reference to the decisions of other circuits would be helpful. Nor would other circuits have the need to

reach the issue. Having raised an issue unique to the laws of Oregon, Petitioners have failed to bring their Petition for a Writ of Certiorari within the provisions of Supreme Court Rule 17.

**Petitioners Fail To Distinguish
The Rules Applicable To A Govern-
ment Agency From Those Applicable
To An Employee Of A Government
Agency**

Petitioners cite Miles v. City of Baker, 152 Or 87, 92-93, 51 P 2d 1047 (1935), for the proposition that a government body cannot contract for a governmental function for a period longer than the government body's term of office. The focus is on the work to be done under the contract. In their Petition, Petitioners focus on the work to be done by the government body itself.

The circuit court correctly ruled that the Housing Authority's Board of Housing Commissioners exercised

"all of the powers and duties" vested in the Housing Authority by statute. Telford, 710 F 2d at 570. The circuit court also correctly ruled that Respondent's powers and duties were determined solely by the Housing Commissioners and created by contract. Ibid. Petitioners' authority concerns the capacity of a municipality in the operation of an airport and a hospital, and in providing for safe passage on the public way; at no time do these cases concern the capacity of an employee of a government agency.

The trial court held that Respondent was hired to perform governmental functions because his duties further the statutory functions of the Housing Authority to provide safe and sanitary housing for persons of lower income. Carried to its logical conclusion, this rule would mean every employee of the Housing Authority, both clerical and custodial, would be

hired to perform government functions, effectively barring them from any employment security. The Ninth Circuit's reversal of this ruling should be allowed to stand.

CONCLUSION

Respondent respectfully requests this court to deny the Petition for Writ of Certiorari.

Dated: December 13, 1983.

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